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17 Blockbuster Inc.

18
19 UNITED STATES DISTRICT COURT
20
21 NORTHERN DISTRICT OF CALIFORNIA

22 NETFLIX, INC., a Delaware corporation,
23 Plaintiff,
24
25 vs.
26 BLOCKBUSTER INC., a Delaware corporation,
27 DOES 1-50,
28 Defendants.

29
30 AND RELATED COUNTER ACTION.

31 CASE NO. C 06 2361 WHA (JCS)

32
33 **DECLARATION OF WILLIAM J.**
34 **O'BRIEN IN SUPPORT OF**
35 **BLOCKBUSTER'S MOTION TO**
36 **COMPEL FURTHER RESPONSES**
37 **TO BLOCKBUSTER'S FIRST SET**
38 **OF REQUESTS FOR PRODUCTION**

39
40 Hearing Date: Dec. 8, 2006
41 Time: 9:30 A.M.
42 Courtroom: A, 15th Floor
43 Judge: Hon. Joseph C Spero
44 Complaint Filed: April 4, 2006

45
46 I, William J. O'Brien, declare:

47
48 **Introduction**

49
50 1. I am an attorney duly admitted to practice before this Court and a partner in
51 the law firm of Alschuler Grossman Stein & Kahan LLP, counsel of record for Defendant and
52 Counterclaimant, Blockbuster Inc., in this case. I am a patent litigator with significant trial and
53 appellate experience. Together with my partner Marshall B. Grossman, I am heading up the
54 representation of Blockbuster in this case.

1 2. I am familiar with the proceedings in this case, including court filings,
 2 discovery, and correspondence. I have personal knowledge of facts stated below except insofar
 3 as another source of information is identified.

4 **Blockbuster's Service of Requests for Production and Special Notice to Netflix Counsel
 About Them**

5 3. I caused Blockbuster's First Set of Requests for Production and First Set of
 6 Interrogatories to be delivered to the offices of counsel of record for Plaintiff and Counter-
 7 Defendant, Netflix, Inc., Keker & Van Nest, LLP, on July 11, 2006. A true and correct copy of
 8 the Requests, which are the subject of Blockbuster's present motion, is Exhibit A to this
 9 Declaration. In addition, the specific requests at issue in this motion – and Netflix's written
 10 responses to them – are reprinted verbatim in Paragraphs 55 through 59 below.

11 4. Because Blockbuster's Requests for Production had been served together
 12 with the Interrogatories on July 11, Netflix's written responses to the Request for Production were
 13 due on August 10, the same date when Netflix's Interrogatory Answers were originally due. On
 14 Page 1 of the Requests for Production, Blockbuster asked that the requested documents be
 15 produced on August 14, 2006.

16 5. On July 11, 2006, the same day that the Requests and Interrogatories were
 17 served, I sent an email to Daralyn Durie of Keker & Van Nest, notifying her of the service and
 18 attaching copies of the Requests and Interrogatories. A true and correct copy of that email is
 19 Exhibit B to this Declaration. In the email, I also gave Ms. Durie a special "heads-up" that
 20 Blockbuster needed discovery responses before the August 17 hearing on Netflix's motion to
 21 dismiss:

22 I want to give you a heads-up at the outset that, while we are
 23 usually inclined to be liberal with extensions of time, these sets of
 24 discovery requests present a special case, because they are largely
 25 directed to facts implicated by Netflix's pending motion to dismiss.
 26 In that motion, as you know, Netflix attacks the facts alleged in
 27 support of certain Blockbuster defenses and counterclaims as
 28 insufficient and argues for the inadequacy of Blockbuster's
 allegations made on information and belief. While we believe that
 our allegations are both proper and adequate to support our claims
 and defenses, we need to be in a position to advise the Court at the
 hearing of what further allegations we can add if we are required to
 amend our pleading.

1 6. In closing, I stated that, “[i]f there are any problems we will need to
 2 address with regard to the discovery requests, I would appreciate your contacting me as early as
 3 possible about them.”

4 7. I never received any response from Netflix’s counsel to my July 11 email.

5 **Netflix’s Request For An Extension of Time to Answer Interrogatories – But Not to**
Respond to Requests for Production

6 8. On August 4, 2006, however, I received a telephone call from Leo Lam of
 7 Keker & Van Nest. Mr. Lam requested an extension of Netflix’s time to answer the First Set of
 8 Interrogatories from August 10 to August 14. During this conversation, I told Mr. Lam about my
 9 July 11 email to Ms. Durie and about the time-sensitivity of receiving the discovery that
 10 Blockbuster had requested that day in view of the August 17 hearing.

11 9. In this context, Mr. Lam and I referred in passing on August 4 to
 12 Blockbuster’s First Set of Requests for Production. While Mr. Lam was thus aware of the
 13 Requests, he never requested any extension of time with regard to them, and Blockbuster never
 14 granted any such extension. Further, contrary to his later assertions, Mr. Lam never said anything
 15 to me on August 4 to indicate that he was under a misapprehension as to when the written
 16 responses to Blockbuster’s First Set of Requests for Production were due or that he did not know
 17 that the written responses were due on August 10. Because the Requests for Production had been
 18 served together with the Interrogatories on July 11, and because written responses, like
 19 interrogatory answers, are due thirty days after service, it appeared obvious to me that the
 20 deadline for written responses was the same as the August 10 deadline for answering the
 21 Interrogatories. It never entered into my mind that Mr. Lam was under any misapprehension
 22 about this seemingly obvious point until August 11, when he asserted for the first time that the
 23 written responses were not due until August 14.

24 10. Despite the ongoing concerns of Blockbuster’s counsel about the time-
 25 sensitivity of the requested discovery, I granted Netflix the extension requested by Mr. Lam and
 26 sent him a confirming email a few minutes later. A true and correct copy of my August 4
 27 confirming email is Exhibit C to this Declaration. As the email reflects, the extension that I
 28

1 granted to Mr. Lam applied only to “Netflix’s time to answer Blockbuster’s first set of
 2 interrogatories” There is no reference to Blockbuster’s Requests for Production anywhere in
 3 the email.

4 11. Mr. Lam did not challenge the accuracy of my August 4 email
 5 confirmation of our conversation and of the scope of the extension granted.¹

6 **Netflix’s Untimely Written Responses to Blockbuster’s Requests for Production**

7 12. Blockbuster’s counsel did not receive written responses to Blockbuster’s
 8 Requests for Production on August 10, 2006, when they were due. No such responses were
 9 served or received until August 14, 2006. On August 11, 2006, I called Mr. Lam, and we spoke
 10 by telephone twice during that day. In the first of these conversations, Mr. Lam told me – for the
 11 first time – that he believed the written responses to Blockbuster’s Requests for Production were
 12 not due until August 14. Initially, Mr. Lam asserted that my August 4 email had said that
 13 Netflix’s written responses were due on August 14. He retracted this assertion when I read him
 14 my August 4 email (Exhibit C), which neither said nor implied anything of the sort. Thereafter,
 15 despite repeated requests on my part, Mr. Lam was not able – then or in later conversations – to
 16 articulate any specific reason why he had believed that to be the case. He merely said that this
 17 was an “inherited impression.” Exhibit D to this declaration is a true and correct copy of a letter I
 18 sent Mr. Lam on August 14, concerning our telephone conversations of August 11.

19 13. Exhibit E is a true and correct copy of Netflix’s written responses to
 20 Blockbuster’s First Set Requests for Production. Blockbuster’s counsel first received these
 21 responses on August 14, 2006, which, according to the attached proof of service, is also the date
 22 when they were served.

23 14. In its written responses, Netflix has asserted objections to every one of
 24 Blockbuster’s 134 Requests. As one example, Netflix has objected even to Request No. 133,
 25 which merely asked for the items that Netflix had listed in its Initial Disclosures as Rule
 26(a)(1)(b) documents. Netflix also objected to producing, and refused to produce, certain patent

27 ¹ As recounted below, Mr. Lam did later assert that, in this email, I had represented that the
 28 written responses to Blockbuster’s First Set of Requests for Production were due August 14.
 However, once I read him the email, Mr. Lam retracted that assertion.

1 filings, prior art that disclosed features claimed in the patents-in-suit, and other documents as
 2 described below.

3 **Netflix's Efforts to Excuse Its Untimely Responses**

4 15. Exhibit F to this declaration is a true and correct copy of a letter I received
 5 from Mr. Lam on August 14, 2006, in response to my letter to him of that date (Exhibit D). In the
 6 third paragraph of his August 14 letter, Mr. Lam asserts, "When I requested and you granted on
 7 August 4 and extension of time until August 14 to respond to Blockbuster's interrogatories, I told
 8 you that Netflix wanted to provide its interrogatory responses on the same day that Netflix's
 9 written responses to Blockbuster's RFPs were due, on Monday, August 14." That statement by
 10 Mr. Lam is incorrect. Mr. Lam's recollection about what he told me in this regard is no more
 11 accurate than his incorrect recollection that my August 4 email had said that the written responses
 12 were due on August 14. Only after I reputed that incorrect assertion did Mr. Lam switch to
 13 reliance on a supposed statement that was oral rather than in writing.

14 16. Similarly, during our initial telephone conversation on August 14, Mr. Lam
 15 denied that Blockbuster's requests for production specified a requested production date, even
 16 though that date appears prominently on the first page of the requests. While I do not question
 17 the sincerity of Mr. Lam's belief in his stated recollection, it does not correspond to the facts of
 18 what occurred.

19 17. Mr. Lam is particularly off-base in suggesting that I withheld a correction
 20 of his professed mistake in order to "wait and claim 'gotcha' . . ." In reality, I would gladly
 21 have corrected Mr. Lam if he had told me that he believed the written responses were due on
 22 August 14, but he made no such assertion on August 4, and the thought never entered my mind
 23 that he was unaware of the seemingly obvious response date. On August 11, when Mr. Lam
 24 asserted for the first time that the written responses were due on August 14, I did immediately
 25 correct him. Until then, I had no occasion or opportunity to do so.

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27

28

1 **Efforts at Compromise Resolution**

2 18. Counsel have extensively discussed, and attempted to resolve, numerous
 3 issues regarding Netflix's responses to Blockbuster's First Set of Requests for Production.² We
 4 have successfully resolved some issues by agreement, but have been unable to resolve others and
 5 need the assistance of the Court in doing so.³

6 19. As noted above, I contacted Netflix's counsel by email about Blockbuster's
 7 First Set of Requests for Production on July 11, 2006 – the same day they were served – and I
 8 spoke by telephone with Netflix's counsel about the requests on August 11, 2006, 31 days after
 9 service. Thereafter, counsel have conferred for multiple hours, in person and by telephone, about
 10 issues related to Netflix's responses to the requests for production. These discussions have
 11 included telephone conferences between my colleague Dominique Thomas and me and Leo Lam,
 12 Eugene Paige, and Ashok Ramani of Keker & Van Nest LLP

13 20. The communications that I have sent to opposing counsel in an attempt to
 14 resolve issues about Blockbuster's Requests for Production have included an August 25, 2006,
 15 letter to Daralyn Durie about the production requests, a true and correct copy of which is
 16 Exhibit G to this Declaration, and an August 31 letter to Eugene Paige, a true and correct copy of
 17 which is Exhibit H, in addition to my August 14 letter to Mr. Lam (Exhibit D.).⁴ My 11-page
 18 letter of August 31 (Exhibit H) confirmed a telephone conference of approximately one and one-
 19 half hours.

20 21. Even so, Mr. Paige suggested, in a letter of September 1, 2006, that we had
 21 not yet fully conferred on all issues. (A true and correct copy of Mr. Paige's September 1, 2006,
 22 letter is Exhibit J to this declaration.) I therefore had another long telephone conference with
 23 Mr. Paige about the Requests for Production on September 5. At the conclusion of that

25 2 A description of these efforts is also included in counsel's joint letter attached as Exhibit 1 to
 26 Blockbuster's Motion to Compel Further Responses to Requests for Production.

27 3 Additionally, Blockbuster reserves all rights to seek additional relief if it becomes necessary to
 28 do so based on future developments, such as any failure by Netflix to produce documents as
 agreed. Netflix has not yet completed the agreed production of documents.

4 Mr. Lam referred me to Mr. Paige in a letter dated August 30, 2006, a true and correct copy of
 which is Exhibit I to this declaration.

1 conversation, he expressed satisfaction that we had addressed the issues raised in his September 1
 2 letter.

3 22. Additionally, on October 13, 2006, I traveled to San Francisco and met
 4 personally with Jeffrey Chanin and Gene Paige of Keker & Van Nest. Prior to that meeting, I
 5 sent Messrs. Chanin and Paige a draft of a proposed joint letter regarding Blockbuster's intended
 6 motion to compel further responses to its first set of requests for production. A true and correct
 7 copy of that draft is Exhibit K to this declaration. During the afternoon and evening of
 8 October 13, we discussed Blockbuster's Requests for Production, Blockbuster's intended motion
 9 to compel further responses to those Requests, and the draft of the joint letter. My partner
 10 Marshall Grossman participated in this conversation by telephone. At the conference, we were
 11 unable to reach agreement on any of the issues addressed in Blockbuster's present motion.

12 **Background for the Requests for Production**

13 **The Pleadings**

14 23. The currently operative pleadings in this case are:

15 a. Netflix's First Amended Complaint for Patent Infringement and
 16 Demand for Jury Trial (Document 28, filed July 26, 2006), a true and correct copy of
 17 which is Exhibit L to this declaration;

18 b. Blockbuster's Answer to First Amended Complaint; Counterclaims;
 19 Demand for Jury Trial (Document 43, filed September 11, 2006), a true and correct copy
 20 of which is Exhibit M to this declaration; and

21 c. Netflix's Reply to Defendant's Counterclaims (document 50, filed
 22 October 2, 2006), a true and correct copy of which is Exhibit N to this declaration.

23 24. In its First Amended Complaint (Exhibit L), Netflix accuses Blockbuster of
 24 infringing two patents, U.S. Patent No. 7,024,381 (Exhibit A to the First Amended Complaint)
 25 and U.S. Patent No. 6,584,450 (Exhibit B to the First Amended Complaint).

26 25. In its Answer (Exhibit M), Blockbuster asserts multiple affirmative
 27 defenses and counterclaims. Blockbuster's affirmative defenses include:

- a. That Netflix’s patents are invalid for anticipation under 35 U.S.C. §102 because they claim subject matter already disclosed in the prior art;
- b. That Netflix’s patent claims were obvious in view of prior art and therefore unpatentable under 35 U.S.C. § 103;
- c. That Netflix’s patents are unenforceable because of inequitable conduct in obtaining the patents, including the failure to disclose material prior art;
- d. That Netflix has misused its patents and is therefore barred from asserting them against Blockbuster;
- e. That Netflix’s patent claims are invalid under 35 U.S.C. § 112, ¶1 because of failure by the Netflix inventors to disclose, in the patent applications and patents, what they regarded as the best way or “best mode” of practicing the claimed inventions.

26. Blockbuster's affirmative defenses of invalidity, unenforceability and patent misuse are set forth in Paragraphs 60-72 of the Answer.

27. Blockbuster also asserts affirmative defenses of laches (Paragraphs 73 through 77 of the Answer) and estoppel (Paragraphs 78 through 80 of the Answer).

28. Blockbuster’s counterclaims include allegations that Netflix has engaged in monopolization and attempted monopolization in violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, through fraudulently obtaining its patents-in-suit and baselessly asserting them in sham litigation against Blockbuster. Blockbuster’s antitrust counterclaims and related allegations about interstate commerce and the relevant market are set forth in Paragraphs 88 through 119 of the Answer. Facts common to both Blockbuster’s affirmative defenses and its counterclaims are set forth in Paragraphs 16 through 59 of the Answer.

29. In Netflix’s Reply (Exhibit N) to Blockbuster’s Counterclaims (Exhibit M), Netflix admits, in Paragraph 98, that it “did not cite any prior art” to the Patent Office during the pendency of the application for the ’450 patent, which is the first of Netflix’s two patents-in-suit.

30. Netflix admits, in Paragraph 31 of the Reply, “that certain specific individuals, including the named inventors and the attorneys who prosecuted the patent

1 applications, owed a duty of candor to the Patent and Trademark Office pursuant to 37 C.F.R.
 2 §1.56(c)." Netflix admits, in Paragraphs 35 and 36 of the Reply, that Netflix's named inventors
 3 singed a "declaration and power of attorney [that] includes a paragraph that states: 'I
 4 acknowledge a duty to disclose information which is known to me to be material to patentability
 5 in accordance with Title 37, Code of Federal Regulations 1.56.'"'

6 31. In Paragraph 44 of its Reply "Netflix admits that it was aware of the
 7 existence of certain patents purportedly owned by NCR during the pendency of the applications
 8 for the '450 and '381 patents." In Paragraph 52, "Netflix admits that it did not disclose the NCR
 9 patents to the Patent Office in conjunction with the '381 patent." Additionally, in Paragraph 44,
 10 "Netflix admits that it was aware of the existence of HBO, Showtime, and TiVo while the
 11 applications were [for the '450 and '381 patents] were pending."

12 **Netflix's Unsuccessful Motion to Dismiss**

13 32. On July 6, 2006, Netflix filed a Motion to Dismiss Blockbuster's antitrust
 14 counterclaims and to strike Blockbuster's defenses of inequitable conduct and patent misuse.
 15 After briefing and argument, this Court denied Netflix's motion in its entirety. A true and correct
 16 copy of the Court's order (Document 40, filed August 22, 2006) is Exhibit O to this declaration.

17 33. On Page 8, Lines 21-28 of the Court's order denying Netflix's motion to
 18 dismiss (Exhibit O), the Court states:

19 Netflix disclosed absolutely ***no*** prior art in applying for the '450
 20 patent. Shortly after that patent issued, Netflix suddenly
 21 bombarded the PTO examiner with over one hundred references in
 22 support of the '381 patent (but not the NCR patents). This is so
 23 even though the same law firm prosecuted both patent applications,
 24 and even though the same named inventors were responsible for
 25 both applications. For Netflix's later patent, the PTO examiner
 26 would have needed to swim through a morass of references and
 27 then go beyond that morass to find the NCR patents.

28 34. Exhibit P to this declaration is a true and correct copy of the reply that
 Netflix filed in support of its motion to dismiss (Document 36, filed August 3, 2006). In
 Footnote 5 on Pages 5 and 6 of this reply, Netflix cited cases in which materiality of omitted prior
 art was supported by references to that art in Patent Office proceedings. Netflix argued, "Here,

1 Blockbuster does not allege the PTO cited the NCR patents against Netflix.” For example,
 2 Netflix cited *Papst Motoren GmbH & Co. v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F. Supp. 864
 3 (S.D.N.Y. 1986), saying, “the court in *Papst* noted that the claimant specifically alleged that (1) a
 4 patent examiner working on a companion patent application had discussed the omitted prior-art
 5 patent with prosecution counsel, and (2) prosecution counsel in fact referred to the omitted prior-
 6 art patent in an amendment while prosecuting the companion application.”

7 **Netflix’s Disclosures About Its Contentions**

8 35. Exhibit Q to this declaration is a true and correct copy of Netflix’s
 9 Amended Initial Disclosures under Rule 26 of the Federal Rules of Civil Procedure, dated
 10 July 28, 2006. At Page 5, Lines 13 through 20 of these Disclosures, Netflix states that it contends
 11 that it has lost profits as a result of Blockbuster’s allegedly infringing activity, including lost
 12 profits from lost subscribers and from price erosion, but Netflix does not provide any details are
 13 amounts of such alleged damages. At Page 5, Lines 21 through 25 of these Disclosures, Netflix
 14 further states that it is entitled to a reasonable royalty from Blockbuster’s alleged infringement,
 15 but Netflix does not specify any rate, calculation, or amount for such a royalty.

16 36. Exhibit R to this declaration is a true and correct copy of the
 17 [Amended][Corrected] Netflix’s Disclosure of Asserted Claims and Preliminary Contentions for
 18 U.S. Patent Nos. 7,024,381 and 6,584,450 (Document 31, filed July 28, 2006. On Page 2 at
 19 Lines 5 through 7 of this [Amended][Corrected] Disclosure, Netflix states:

20 Wishing to preserve its right to rely on the assertion that its own
 21 methods and systems practice the claimed invention pursuant to
 22 Patent L.R. 3-1(f), Netflix discloses that it practices each asserted
 23 claim in both the ’391 [sic] and ’450 Patents.

24 37. Exhibit A to the [Amended] [Corrected] Disclosure is a table submitted by
 25 Netflix purporting to compare the Blockbuster Online service identified as “the accused
 26 instrumentality” to multiple asserted claims of Netflix’s ’381 patent. On Page 13 of Exhibit A to
 27 the [Amended][Corrected] Disclosure, Netflix purports to compare Blockbuster Online to
 28 Claim 34 of the ’381 patent. In doing so, Netflix breaks Claim 34 into portions designated as
 “34a” through “34e”. The portion of the claim designated as 34a reads, “establishing over the

1 Internet a rental agreement with a customer that provides for charging the customer a periodic
 2 fee.” Referring to the other portions of Claim 34, Netflix merely refers to its preceding
 3 Contentions 1a through 1e, which appear on Pages 1-3 of Exhibit A to the [Amended][Corrected]
 4 Disclosure and purport to compare Blockbuster Online to Claim 1 of the ’381 patent. Based on
 5 the [Amended][Corrected] Disclosure, the understanding of Blockbuster’s counsel is that Netflix
 6 contends that Blockbuster infringes Claim 23 of the ’381 patent for the same reasons it allegedly
 7 infringes Claim 1, with the sole distinction being Claim 34’s addition of the requirement for
 8 “establishing over the Internet a rental agreement with a customer that provides for charging the
 9 customer a periodic fee” (portion 34a).

10 **Blockbuster’s Invalidity Contentions**

11 38. Blockbuster’s filings disclosing its Preliminary Invalidity Contentions
 12 provide further information about issues in this case. Exhibit X to this Declaration is a true and
 13 correct copy of Blockbuster’s Invalidity Contentions for U.S. Patent No. 6,584,450
 14 (Document 45, filed September 18, 2006), while Exhibit Y is a true and correct copy of
 15 Blockbuster’s Preliminary Invalidity Contentions for U.S. Patent No. 7,024,381 (Document 46,
 16 filed September 18, 2006).⁵

17 39. For example, information about Blockbuster’s best-mode defenses with
 18 regard to the ’450 patent is provided at Page 6, Line 14 through Page 7, Line 13 of Exhibit X.
 19 Information about Blockbuster’s best-mode defenses as to the ’381 patent is provided at Page 6,
 20 Lines 1 through 27 of Exhibit Y. As stated in these documents, Blockbuster’s best-mode
 21 defenses include that claims of the ’450 and ’381 patents recite selecting movies or other items
 22 for delivery to a customer but do not disclose any mode of selecting items or movies that
 23 prioritizes between requests of different customers. For instance, the patents do not disclose any
 24 mode of selecting movies or other items that takes into account how often a customer returns

25
 26
 27 ⁵ Blockbuster’s detailed charts concerning prior art supporting its invalidity contentions are not
 28 included in these exhibits because of their bulk. Inclusion of these charts would have resulted in
 submission of approximately 824 pages with respect to the ’450 patent and approximately 628
 pages with respect to the ’381 parent.

1 them and receives new ones, nor any step method, device, or feature for anything known or
 2 described as “throttling.”

3 40. As further reflected in Exhibits X and Y, Blockbuster contends that claims
 4 of the '450 and '381 patents recite delivery of moves or other items to customers and delivery by
 5 mail but do not disclose any particular type, design, or features for the envelope or package used
 6 for such delivery or for return of movies or other items by a customer.

7 **“Throttling” and the Related Class Action Against Netflix**

8 41. During our investigation for this case, Blockbuster’s counsel have become
 9 aware of a recently settled class action lawsuit against Netflix, *Frank Chavez v. Netflix, Inc.*, Case
 10 No. CGC-04-434884 in the Superior Court for the State of California for the City and County of
 11 San Francisco. Exhibit S to this Declaration is a true and correct copy of the Complaint in that
 12 case, obtained from the San Francisco Superior Court’s case file. In Paragraph 32 on Pages 8 and
 13 9 of this Complaint, the class-action plaintiff alleges that Netflix “intentionally designed their
 14 business processes and operating software so as to increase the delivery times to many
 15 customers . . . and to significantly decrease and/or limit the number of DVDs that can be rented in
 16 a month.” The class-action plaintiff goes on to provide some particulars of the alleged Netflix
 17 conduct at issue. For example, in Sub-Paragraph 32a, he alleges that Netflix “prioritize[d]
 18 shipping DVDs . . . to account holders who have rented the fewest DVDs in prior months.
 19 Customers who rent the fewest DVDs per month are the most profitable. . . .”

20 42. In Paragraph 35 on Page 11 of the Class Action Complaint, it is alleged
 21 that Netflix’s conduct “unfairly disadvantages” competitors – such as Blockbuster – “who more
 22 accurately disclose their delivery times.”

23 43. This class action lawsuit and Netflix’s “throttling” practices received
 24 considerable attention in the media and on the Internet. Exhibit T is a true and correct copy of a
 25 typical article on the case from *DVD Rental News*, dated February 10, 2006.

26 44. Exhibit U is a copy of the Order Approving Settlement of the *Chavez* class
 27 action, dated April 28, 2006, and signed by the Hon. Thomas J. Mellon, Jr., of the San Francisco
 28 Superior Court. Blockbuster’s counsel obtained this document from the Superior Court case file.

1 45. Netflix's patents-in-suit (Exhibits A and B to Netflix's First Amended
 2 Complaint, which is Exhibit L to this declaration) do not provide any disclosure concerning
 3 "throttling" or other procedures for prioritizing between requests of different customers as
 4 described in the *Chavez* Class Action Complaint.

5 **Other Information Received About Netflix**

6 46. Exhibit V to this declaration is a true and correct copy of an article found
 7 by Blockbuster's counsel on the Internet at the website "MarketingProfs.com," dated April 11,
 8 2006 and entitled "Five Lessons From the Netflix Startup Story." The article is co-authored by
 9 Jim Cook, who is described on Page 5 of the article as "a Netflix cofounder." On Pages 1 through
 10 3 of the article, Mr. Cook describes issues addressed by Netflix with regard to U.S. Postal Service
 11 operations and packaging. Among other things, Mr. Cook states, on Page 2:

12 In short, we figured out a way to make it all work. . . .

13 We knew that if we didn't find a way to work within the US Post
 14 Office's systems, we wouldn't succeed. . . . To understand how the
 15 Post Office backend worked, I spent hundred of hours at a few of
 16 the largest regional Postal Centers, observing and asking tons of
 17 questions.

18 I noticed letters being sorted by several high spinning circular
 19 drums. . . . [I]t was obvious that a thin plastic DVD would not
 20 survive the journey. . . .

21 I found out that if an envelope had certain dimensions and other
 22 characteristics, it would be sorted by [an] alternative system instead
 23 of the large, crushing metal drums. . . .

24 Our resulting "Netflix envelope" was one of the biggest "customer
 25 wows." Its design was critical not only for the customer experience
 26 but also for our operations and business mode. We had to design
 27 the envelope so that it met several criteria. . . .

28 47. Mr. Cook's article (Exhibit V) also includes a section on Page 4 entitled
 29 "Copy the best." Mr. Cook states, "When designing the Netflix Web site we turned to the best:
 30 Amazon." He proceeds to list six "ideas that we adapted [from Amazon] for the Netflix Web
 31 site"

32 48. Exhibit W to this declaration is a true and correct copy of an email dated
 33 February 7, 2006 received Blockbuster through the email address
 34

1 “investor.relations@blockbuster.com.” The email is if from a postal employee named William
 2 Grubb, who advised Netflix of special processing procedures in use on behalf of Netflix (but not
 3 Blockbuster) at the Post Office where he works.⁶

4 49. Netflix’s patents-in-suit (Exhibits A and B to Netflix’s First Amended
 5 Complaint, which is Exhibit L to this declaration) do not provide any disclosure concerning
 6 Postal Service machinery or systems, special postal processing procedures, or envelope design.
 7 In fact, the patents do not mention envelopes at all.

8 **Blockbuster’s Attempts to Gather Evidence About Claimed Features in the Prior Art**

9 50. Blockbuster has conducted an extensive search for prior art disclosing
 10 features claimed in the patents-in-suit. Blockbuster wishes to use such prior art to support its
 11 invalidity defenses of anticipation and obviousness. In addition, to the extent that Blockbuster
 12 can establish knowledge by Netflix of material undisclosed prior art, it intends to use such
 13 information to support its inequitable conduct defenses and antitrust counterclaims.

14 51. Netflix’s ’450 patent bears an application filing date of April 28, 2000.
 15 The ’381 patent claims priority of that application as well. Blockbuster’s prior art search is
 16 therefore focused on prior art existing as of April 28, 1999 – one year before Netflix’s claimed
 17 priority date. For example, under 35 U.S.C. § 102(b), a person is not entitled to a patent if “the
 18 invention was patented or described in a printed publication in this or a foreign country or in
 19 public use or on sale in this country, more than one year prior to the date of the application for
 20 patent in the United States”

21 52. Many of the Requests for Production now in dispute with Netflix constitute
 22 attempts by Blockbuster to identify relevant prior art and, especially, prior art known to Netflix
 23 but not disclosed by it to the Patent and Trademark Office in obtaining the patents-in-suit. Such
 24 Requests include Nos. 32, 34-36, 55-57, 67-71, 73-74, 78-81, 86, 88-90, 93-100, 105, 113-17, and
 25 119.

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 28 ⁶ Material reflecting subsequent forwarding of Mr. Grubb’s email has been omitted from
 Exhibit W.

1 53. Of these Requests, Nos. 32, 34, 35, and 36 request documents related to
 2 particular prior art businesses or categories of prior art businesses, such as HBO, Showtime, or
 3 other subscription cable or satellite television services or pay television services in existence
 4 before April 28, 1999 (Request No. 32), Webvan, Homegrocer.com, or other Internet grocery
 5 service in existence before April 28, 1999 (Request No. 34), Amazon.com (Request No. 35), and
 6 eBay (Request No. 36).

7 54. The remainder of the prior-art related Requests seek information pre-dating
 8 April 28, 1999, concerning prior art that included various features that Netflix has included in
 9 claims in the patents-in-suit. The following table provides illustrative comparisons between
 10 features in these Requests for Production and features recited in Claims of the '381 and '450
 11 patents:

Features of Prior Art Requested in Requests for Production (Exhibit A)	Similar Features Claimed in Patents-in-Suit (Exhibits A & B to Exhibit L)
“computer-implemented rental of movies to a customer” (Request No. 55) “computer-implemented rental of movies to customers” (Request No. 56)	“A computer-implemented method for renting movies to customers . . .” ('381 patent, Claims 1, 14, 24, 34) “A method for renting items to customers, the method comprising the computer-implemented steps [described below].” ('450 patent, Claims 1, 16, 31)
	“A computer-readable medium for renting items to customers, the computer-readable medium carrying one or more sequences of one or more instructions which, when executed by one or more processors, cause the one or more processors to perform the computer-implemented steps [described below].” ('450 patent, Claims 36, 81)
“providing electronic digital information that caused one or more attributes of movies to be displayed” (Request No. 57)	“providing electronic digital information that causes one or more attributes of movies to be displayed . . .” ('381 patent, Claims 1, 14, 24, 34, 44)
“a rental agreement that provided for a periodic fee” (Request No. 67)	“a rental agreement with a customer that provides for charging the customer a periodic fee . . .” ('381 patent, Claim 34)
“establishing a rental agreement over the Internet” (Request No. 68)	“establishing over the Internet a rental agreement . . .” ('381 patent, Claim 34)
“shipping a movie only if a fee was current” (Request No. 69)	“if the customer is current on the periodic fee, selecting another movie based upon the order of the list and causing the selected movie to be delivered to the customer . . .” ('381 patent, Claim 34)

1	Features of Prior Art Requested in Requests for Production (Exhibit A)	Similar Features Claimed in Patents-in-Suit (Exhibits A & B to Exhibit L)
2	“computer system for renting movies” (Request No. 70)	“A computer system for renting movies to customers . . .” (’381 patent, Claim 44)
3		“An apparatus for renting items to customers comprising . . . one or more processors . . .” (’450 patent, Claim 51)
4		
5	“renting movies using a computer coupled to a digital telecommunications network” (Request No. 71)	“A computer system for renting movies to customers, comprising: . . . a computer that is coupled to a digital telecommunications network . . .” (’381 patent, Claim 44)
6		
7	“renting movies using a computer with electronic digital memory” (Request No. 73)	“A computer system for renting movies to customers, comprising: . . . a computer [and] an electronic digital memory in the computer . . .” (’381 patent, Claim 44)
8		“An apparatus for renting items to customers comprising . . . a memory communicatively coupled to the one or more processors . . .” (’450 patent, Claim 51)
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11	“renting movies using a computer with programs stored in memory causing the computer to perform steps” (Request No. 74)	“A computer system for renting movies to customers, comprising: . . . a computer . . .; an electronic digital memory in the computer [and] one or more sequences of computer program instructions stored in the electronic digital memory which, when executed, cause the computer to perform the steps [described below].” (’381 patent, Claim 44)
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19	“computer-implemented method in which two or more movies for renting to a customer are selected by a customer” (Request No. 78)	“A computer-implemented method as recited in claim 1 [or 14 or 24 or 34], wherein the two or more movies for renting to the customer are selected by the customer.” (’381 patent, Claims 5, 18, 28, 38)
20		
21	“determining the order of two or more movies based upon one or more preferences of a customer” (Request No. 79)	“A computer-implemented method as recited in claim 1 [or 14 or 24], further comprising determining the order of the two or more movies based upon one or more preferences of the customer.” (’381 patent, Claims 6, 19, 29)
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23		
24	“delivery of a selected movie by mail” (Request No. 80)	“A computer-implemented method as recited in claim 1 [or 14 or 24 or 34 or 44], wherein the delivery of the selected movie comprises delivery by mail.” (’381 patent, Claims 7, 20, 30, 40, 48)
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28		“A method as recited in claim 31, wherein movies are provided to the customer by mail.” (’450 patent, Claim 34)
		“A computer-readable medium as recited in

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	Features of Prior Art Requested in Requests for Production (Exhibit A)	Similar Features Claimed in Patents-in-Suit (Exhibits A & B to Exhibit L)
		claim 96, wherein movies are provided to the customer by mail.” ('450 patent, Claim 99)
“delivery of a selected movie by mail on one or more optical media” (Request No. 81)		“A computer-implemented method as recited in claim 1 [or 14 or 24 or 34 or 44], wherein the delivery of the selected movie comprises delivery by mail on one or more optical media.” ('381 patent, Claims 8, 21, 31, 41, 49)
“rental of any of motion pictures, television series, documentaries, cartoons, music videos, video recordings of concert performances, instructional programs, or educational programs” (Request No. 86)		“A method as recited in claim 1, wherein the movies comprise any of motion pictures, television series, documentaries, cartoons, music videos, video recordings of concert performances, instructional programs, and educational programs.” ('381 patent, Claim 13)
“providing a customer up to a specified number of items indicated by one or more selection criteria” (Request No. 88)		“providing to the customer up to a specified number of the one or more items indicated by the one or more item selection criteria . . .” ('450 patent, Claims 1, 16, 31, 51, 81, 96)
“providing to the customer one or more other items indicated by the one or more item selection criteria, wherein a total current number of items provided to the customer does not exceed the specified number . . .” ('450 patent, Claim 36)		
“in response to receiving one or more items provided to a customer, providing the customer one or more other items indicated by one or more item selection criteria” (Request No. 89)		“in response to receiving any of the items provided to the customer, providing to the customer one or more other items indicated by the one or more item selection criteria . . .” ('450 patent, Claims 1, 16)
“rental of items to a customer in which the total current number of items provided to the customer did not exceed a specified number” (Request No. 90)		“A computer-implemented method as recited in claim 1 [or 14 or 24 or 34], wherein a number of movies delivered to the customer and not yet returned does not exceed the specified number.” ('381 patent, Claims 10, 23, 33, 43)
“A computer system as recited in claim 44, wherein a number of movies delivered to the customer and not yet returned does not exceed the specified number.” ('381 patent, Claim 51)		
“computer-readable medium for renting items to customers” (Request No. 93)		“A computer-readable medium for renting items to customers . . .” ('450 patent, Claims 36, 81)
“computer-readable medium for renting items to customers that carried one or more sequences of instructions (Request No. 94)		“A computer-readable medium for renting items to customers, the computer-readable medium carrying one or more sequences of one or more instructions . . .” ('450 patent, Claims 36, 81)
“instructions that, when executed by one or more processors, caused one or more of them to perform steps for renting items to customers” (Request No. 95)		“instructions which, when executed by one or more processors, cause the one or more processors to perform the computer-implemented steps [described below].” ('450 patent, Claims 36, 81)
“A computer system for renting movies to customers, comprising: . . . one or more sequences of computer program instructions stored in the electronic digital memory which, when executed, cause the computer to perform the		
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		steps [described below]." ('381 patent, Claim 44)
"apparatus for renting items to customers, the apparatus including one or more processors" (Request No. 96)		"An apparatus for renting items to customers comprising . . . one or more processors . . ." ('450 patent, Claim 51)
"apparatus for renting items to customers, the apparatus including a memory communicatively coupled to the one or more processors, the memory including one or more sequences of one or more instructions which, when executed by the one or more processors, caused the one or more processors to perform steps" (Request No. 97)		"An apparatus for renting items to customers comprising . . . one or more processors; and a memory communicatively coupled to the one or more processors, the memory including one or more sequences of one or more instructions which, when executed by the one or more processors, cause the one or more processors to perform the steps [described below]." ('450 patent, Claim 51)
"apparatus for renting items to customers comprising an item rental mechanism configured to perform steps" (Request No. 98)		"An apparatus for renting items to customers comprising an item rental mechanism configured to [perform steps described below]." ('450 patent, Claim 66)
"rental of items to customers in which a total number of items provided to the customer within a specified period of time did not exceed a specified limit" (Request No. 99)		"A method as recited in claim 1 ['A method for renting items to customers . . .'], wherein a total number of items provided to the customer within a specified period of time does not exceed a specified limit." ('450 patent, Claim 2)
		"A method for renting items to customers, . . . wherein a total number of items provided to the customer within a specified period of time does not exceed a specified limit." ('450 patent, Claim 16)
		"A computer-readable medium as recited in claim 36 ['A computer-readable medium for renting items to customers . . .'], wherein the total number of items provided to the customer within a specified period of time does not exceed a specified limit." ('450 patent, Claim 37)
		"An apparatus as recited in claim 66, wherein the total number of items provided to the customer within a specified period of time does not exceed a specified limit." ('450 patent, Claim 67)
"rental of items to customers in which a total number of items provided to the customer within a specified period of time did not exceed a specified number" (Request No. 100)		"renting items . . . providing to the customer up to a specified number of the one or more items indicated by the one or more item selection criteria . . ." ('450 patent, Claims 1, 16, 51, 81)
		"renting items . . . providing to the customer one or more other items indicated by the one or more item selection criteria, wherein a total current number of items provided to the customer does not exceed the specified number . . ." ('450 patent, Claim 36)
		"renting movies . . . providing to the customer up to a specified number of the one or more items indicated by the one or more item selection

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	Features of Prior Art Requested in Requests for Production (Exhibit A)	Similar Features Claimed in Patents-in-Suit (Exhibits A & B to Exhibit L)
		criteria . . .” ('450 patent, Claims 31, 96)
	“item selection criteria specifying one or more preferred item attributes” (Request No. 105)	“A method as recited in claim 1 [or 16], wherein . . . the one or more item selection criteria specifies one or more preferred item attributes . . .” ('450 patent, Claims 6, 21)
		“A computer-readable medium as recited in claim 36 [or 81], wherein the one or more item selection criteria specifies one or more preferred item attributes . . .” ('450 patent, Claims 41, 86)
		“An apparatus as recited in claim 51 [or 66], wherein the one or more item selection criteria specifies one or more preferred item attributes . . .” ('450 patent, Claims 56, 71)
	“in response to receiving a customer notification, providing the customer a second set of one or more items indicated by item selection criteria” (Request No. 113)	“A method as recited in claim 1 [or 16], further comprising in response to receiving a customer notification, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” ('450 patent, Claims 8, 23)
		“A computer-readable medium as recited in claim 36, further comprising in response to receiving a customer notification, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” ('450 patent, Claim 43)
	“in response to expiration of a specified amount of time, providing a customer a second set of one or more items indicated by item selection criteria” (Request No. 114)	“A method as recited in claim 1 [or 16], further comprising in response to expiration of a specified amount of time, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” ('450 patent, Claims 9, 24)
		“A computer-readable medium as recited in claim 36 [or 81], further comprising in response to expiration of a specified amount of time, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” ('450 patent, Claims 44, 89)
		“An apparatus as recited in claim 51 [or 66], further comprising in response to expiration of a specified amount of time, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” ('450 patent, Claims 59, 74)

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Features of Prior Art Requested in Requests for Production (Exhibit A)	Similar Features Claimed in Patents-in-Suit (Exhibits A & B to Exhibit L)
	to a specified date being reached, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” ('450 patent, Claims 45, 90) “An apparatus as recited in claim 51 [or 66], further comprising in response to a specified date being reached, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” ('450 patent, Claims 60, 75)
“in response to a specified fee being received, providing a customer a second set of one or more items indicated by item selection criteria” (Request No. 116)	“A method as recited in claim 1 [or 16], further comprising in response to a specified fee being received, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” ('450 patent, Claims 11, 26) “A computer-readable medium as recited in claim 36 [or 81], further comprising in response to a specified fee being received, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” ('450 patent, Claims 46, 91) “An apparatus as recited in claim 51 [or 66], further comprising in response to a specified fee being received, providing to the customer a second set of one or more other items indicated by the one or more item selection criteria.” ('450 patent, Claims 61, 76)
“providing rental items to a customer by mail” (Request No. 117)	“A method as recited in claim 1 [or 16], wherein items are provided to the customer by mail.” ('450 patent, Claims 12, 27) “A computer-readable medium as recited in claim 36 [or 81], wherein items are provided to the customer by mail.” ('450 patent, Claims 47, 92) “An apparatus as recited in claim 51 [or 66], wherein items are provided to the customer by mail.” ('450 patent, Claims 66, 77)
“renting movies” (Request No. 119)	“A method for renting movies to customers . . .” ('450 patent, Claim 31) “A computer-readable medium for renting movies to customers . . .” ('450 patent, Claim 96) “A . . . method for renting movies to customers . . .” ('381 patent, Claims 1, 14, 24, 34)

1 **The Disputed Requests for Production and Netflix's Responses**

2 55. The Requests for Production and Responses that are particularly in dispute
 3 in Blockbuster's present motion are set forth verbatim below. For the Court's convenience, they
 4 are grouped into four categories.

5 **Documents Related to Netflix Patents and Applications or to Patent Rights Related**
 6 **to Blockbuster Online or to Netflix (Requests Nos. 3-5, 10-16, 46-49, and 52-54)**

7 56. The text of each of these Requests and of each of Netflix's Written
 Responses to them is as follows:

8 **REQUEST FOR PRODUCTION NO. 3:**

9 All MATERIALS submitted to or received from the United States Patent and
 10 Trademark Office or any other patent office or agency in connection with any SUBJECT
 11 PATENT OR APPLICATION.

12 **RESPONSE TO REQUEST FOR PRODUCTION NO. 3:**

13 Netflix objects to Blockbuster's demand that it produce documents relating to its
 14 patents and/or applications other than the patents-in-suit, because such patents/applications have
 15 no relevance to any issue in this case. Netflix further objects to producing documents relating to
 16 its patent applications that have not either been issued or been published on the grounds that the
 17 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
 18 information regarding Netflix's future business plans, and should not be produced to a company
 19 that is seeking directly to compete with Netflix in the market, such as Blockbuster. Netflix
 20 further objects to Blockbuster's Request that it produce documents relating to prosecution of
 21 patents before patent offices or agencies other than the United States Patent and Trademark
 22 Office. The prosecution of patents that are not only not asserted in this case, but cannot be
 23 asserted here because they are being prosecuted and will be issued in a foreign country, is in no
 24 way relevant to any of the issues presented in this case.

25 Netflix objects to this Request as overly broad and unduly burdensome, seeking
 26 material that is irrelevant to the subject matter of this action and is not reasonably calculated to
 27 lead to the discovery of admissible evidence. Netflix also objects to this Request to the extent
 28

that it calls for information protected by the attorney-client privilege or the work product doctrine. Further, Netflix objects to the extent that this Request duplicates prior Requests.

Subject to and without waiving the foregoing objections, Netflix will produce all nonprivileged, responsive documents so described and related to the '381 and '450 patents that are locatable after a diligent search of all locations at which such materials might plausibly exist.

REQUEST FOR PRODUCTION NO. 4:

All files of NETFLIX, including any NETFLIX patent attorney or patent agent, for any SUBJECT PATENT or APPLICATION.

RESPONSE TO REQUEST FOR PRODUCTION NO. 4:

Netflix objects to Blockbuster's demand that it produce documents relating to its patents and/or applications other than the patents-in-suit, because such patents/applications have no relevance to any issue in this case. Netflix further objects to producing documents relating to its patent applications that have not either been issued or been published on the grounds that the pendency of these patents, and the nature of the areas that they cover, is competitively sensitive information regarding Netflix's future business plans, and should not be produced to a company that is seeking directly to compete with Netflix in the market, such as Blockbuster.

Netflix also objects to this Request to the extent that it calls for information protected by the attorney-client privilege or the work product doctrine. Further, Netflix objects to the extent that this Request duplicates prior Requests.

Subject to and without waiving the foregoing objections, Netflix will produce all nonprivileged, responsive documents so described and related to the '381 and '450 patents that are locatable after a diligent search of all locations at which such materials might plausibly exist.

REQUEST FOR PRODUCTION NO. 5:

All MATERIALS constituting, recording, referring to, or evidencing any assertion of, or attempt to license, any SUBJECT APPLICATION OR PATENT.

RESPONSE TO REQUEST FOR PRODUCTION NO. 5:

Netflix objects to Blockbuster's demand that it produce documents relating to its patents and/or applications other than the patents-in-suit, because such patents/applications have

1 no relevance to any issue in this case. Netflix further objects to producing documents relating to
 2 its patent applications that have not either been issued or been published on the grounds that the
 3 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
 4 information regarding Netflix's future business plans, and should not be produced to a company
 5 that is seeking directly to compete with Netflix in the market, such as Blockbuster.

6 Netflix objects to this Request as overly broad and unduly burdensome, seeking
 7 material that is irrelevant to the subject matter of this action and is not reasonably calculated to
 8 lead to the discovery of admissible evidence. Netflix also objects to this Request to the extent
 9 that it calls for information protected by the attorney-client privilege or the work product doctrine.
 10 Further, Netflix objects to the extent that this Request duplicates prior Requests.

11 Subject to and without waiving the foregoing objections, Netflix will produce all
 12 nonprivileged, responsive documents so described and related to the '381 and '450 patents that
 13 are locatable after a diligent search of all locations at which such materials might plausibly exist.

14 **REQUEST FOR PRODUCTION NO. 10:**

15 All MATERIALS asserting, referring to or evidencing the scope of any SUBJECT
 16 APPLICATION OR PATENT or any aspect of the construction of any claim of any such
 17 application or patent.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 10:**

19 Netflix objects to Blockbuster's demand that it produce documents relating to its
 20 patents and/or applications other than the patents-in-suit, because such patents/applications have
 21 no relevance to any issue in this case. Netflix further objects to producing documents relating to
 22 its patent applications that have not either been issued or been published on the grounds that the
 23 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
 24 information regarding Netflix's future business plans, and should not be produced to a company
 25 that is seeking directly to compete with Netflix in the market, such as Blockbuster.

26 Netflix also objects to this Request to the extent that it calls for information
 27 protected by the attorney-client privilege or the work product doctrine. Netflix further objects to
 28 this Request as vague and ambiguous with regard to "scope", and understands the term to refer to

1 construction of claims. To the extent that Blockbuster demands Netflix produce materials that
 2 would evidence Netflix's construction of a claim, Netflix objects to the Request as premature in
 3 that it seeks to impose upon Netflix a duty to come forward with a claim construction well prior
 4 to the date provided for in the Court's Case Management Order and the Local Rules of this Court,
 5 and objects to the Request as well as calling for a legal conclusion. Netflix objects to the extent
 6 that this Request duplicates prior Requests.

7 Subject to and without waiving the foregoing objections, Netflix will produce all
 8 nonprivileged, responsive documents so described and related to the '381 and '450 patents that
 9 are locatable after a diligent search of all locations at which such materials might plausibly exist.

10 **REQUEST FOR PRODUCTION NO. 11:**

11 All MATERIALS asserting, referring to or evidencing the patentability or
 12 unpatentability of any SUBJECT APPLICATION OR PATENT or of any claim of any such
 13 application or patent.

14 **RESPONSE TO REQUEST FOR PRODUCTION NO. 11:**

15 Netflix objects to Blockbuster's demand that it produce documents relating to its
 16 patents and/or applications other than the patents-in-suit, because such patents/applications have
 17 no relevance to any issue in this case. Netflix further objects to producing documents relating to
 18 its patent applications that have not either been issued or been published on the grounds that the
 19 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
 20 information regarding Netflix's future business plans, and should not be produced to a company
 21 that is seeking directly to compete with Netflix in the market, such as Blockbuster.

22 Netflix objects to this Request to the extent that it calls for information protected
 23 by the attorney-client privilege or the work product doctrine. Further, Netflix objects to the
 24 extent that this Request duplicates prior Requests. Netflix further objects as the demand for
 25 materials "evidencing patentability or unpatentability" is vague, ambiguous, and calls for a legal
 26 conclusion.

27 Subject to and without waiving the foregoing objections, Netflix will produce all
 28 nonprivileged, responsive documents so described and related to the '381 and '450 patents that

1 are locatable after a diligent search of all locations at which such materials might plausibly exist.

2 **REQUEST FOR PRODUCTION NO. 12:**

3 All MATERIALS asserting, referring to or evidencing the patentability or
 4 unpatentability of any method performed by NETFLIX or of any related apparatus or computer-
 5 readable medium.

6 **RESPONSE TO REQUEST FOR PRODUCTION NO. 12:**

7 Netflix objects to this Request to the extent that it calls for information protected
 8 by the attorney-client privilege or the work product doctrine. Netflix further objects to this
 9 Request as the phrases "any method performed" or "any related apparatus or computer-readable
 10 medium" is vague and ambiguous. Netflix further objects as the demand for materials
 11 "evidencing the patentability or unpatentability" is vague, ambiguous, and calls for a legal
 12 conclusion.

13 Netflix also objects to this Request as overly broad and unduly burdensome,
 14 seeking material that is irrelevant to the subject matter of this action and is not reasonably
 15 calculated to lead to the discovery of admissible evidence. To the extent this Request seeks
 16 material relevant to the subject matter of this action, Netflix objects that this Request duplicates
 17 prior Requests.

18 **REQUEST FOR PRODUCTION NO. 13:**

19 All MATERIALS constituting, recording, referring to, or evidencing
 20 COMMUNICATIONS between W. Reed Hastings and Edward Stead concerning any SUBJECT
 21 PATENT or APPLICATION.

22 **RESPONSE TO REQUEST FOR PRODUCTION NO. 13:**

23 Netflix objects to Blockbuster's demand that it produce documents relating to its
 24 patents and/or applications other than the patents-in-suit, because such patents applications have
 25 no relevance to any issue in this case. Netflix further objects to producing documents relating to
 26 its patent applications that have not either been issued or been published on the grounds that the
 27 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
 28 information regarding Netflix's future business plans, and should not be produced to a company

1 that is seeking directly to compete with Netflix in the market, such as Blockbuster. Netflix
2 further objects to the extent that these materials are in Blockbuster's possession.

6 | **REQUEST FOR PRODUCTION NO. 14:**

7 All MATERIALS constituting, recording, referring to, or evidencing
8 COMMUNICATIONS between NETFLIX and BLOCKBUSTER concerning any SUBJECT
9 PATENT or APPLICATION.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 14:**

11 Netflix objects to Blockbuster's demand that it produce documents relating to its
12 patents and/or applications other than the patents-in-suit, because such patents/applications have
13 no relevance to any issue in this case. Netflix further objects to producing documents relating to
14 its patent applications that have not either been issued or been published on the grounds that the
15 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
16 information regarding Netflix's future business plans, and should not be produced to a company
17 that is seeking directly to compete with Netflix in the market, such as Blockbuster. Netflix also
18 objects to the extent that these materials are in Blockbuster's possession.

22 | REQUEST FOR PRODUCTION NO. 15:

23 All MATERIALS constituting, recording, referring to, or evidencing
24 COMMUNICATIONS concerning any patent rights, patent license, or patent infringement related
25 to Blockbuster Online.

26 | **RESPONSE TO REQUEST FOR PRODUCTION NO. 15:**

27 Netflix objects to this Request as overly broad and unduly burdensome, seeking
28 material that is irrelevant to the subject matter of this action and is not reasonably calculated to

1 lead to the discovery of admissible evidence. Netflix also objects to this Request to the extent
2 that it calls for information protected by the attorney-client privilege or the work product doctrine.

3 Subject to and without waiving the foregoing objections, Netflix will produce all
4 nonprivileged, responsive documents so described and related to the '381 and '450 patents that
5 are locatable after a diligent search of all locations at which such materials might plausibly exist.

6 | REQUEST FOR PRODUCTION NO. 16:

7 All MATERIALS constituting, recording, referring to, or evidencing
8 COMMUNICATIONS concerning any patent rights, patent license, or patent infringement related
9 to NETFLIX.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 16:**

11 Netflix objects to this Request to the extent that it seeks documents relating to its
12 patents and/or applications other than the patents-in-suit, because such patents/applications have
13 no relevance to any issue in this case. Netflix further objects to producing documents relating to
14 its latent applications that have not either been issued or been published on the grounds that the
15 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
16 information regarding Netflix's future business plans, and should not be produced to a company
17 that is seeking directly to compete with Netflix in the market, such as Blockbuster.

18 Netflix objects to this Request on the grounds that it is overly broad and unduly
19 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
20 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to
21 this Request to the extent that it calls for information protected by the attorney-client privilege or
22 the work product doctrine.

23 **REQUEST FOR PRODUCTION NO. 46:**

24 All MATERIALS constituting, recording, referring to, or evidencing submission
25 of any prior art reference or other information to the United States Patent and Trademark Office
26 or any other patent office or agency in connection with any SUBJECT APPLICATION OR
27 PATENT.

28 | **RESPONSE TO REQUEST FOR PRODUCTION NO. 46:**

1 Netflix objects to Blockbuster's demand that it produce documents relating to its
 2 patents and/or applications other than the patents-in-suit, because such patents/applications have
 3 no relevance to any issue in this case. Netflix further objects to producing documents relating to
 4 its patent applications that have not either been issued or been published on the grounds that the
 5 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
 6 information regarding Netflix's future business plans, and should not be produced to a company
 7 that is seeking directly to compete with Netflix in the market, such as Blockbuster. Netflix
 8 further objects to Blockbuster's Request that it produce documents relating to prosecution of
 9 patents before patent offices or agencies other than the United States Patent and Trademark
 10 Office. The prosecution of patents that are not only not asserted in this case, but cannot be
 11 asserted here because they are being prosecuted and will be issued in a foreign country, is in no
 12 way relevant to any of the issues presented in this case.

13 Netflix objects to this Request on the grounds that it is overly broad and unduly
 14 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
 15 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to
 16 this Request to the extent that it calls for information protected by the attorney-client privilege or
 17 the work product doctrine. Netflix also objects to the extent that this Request duplicates prior
 18 Requests.

19 Subject to and without waiving the foregoing objections, Netflix will produce all
 20 nonprivileged, responsive documents so described and related to the '381 and '450 patents that
 21 are locatable after a diligent search of all locations at which such materials might plausibly exist.

22 **REQUEST FOR PRODUCTION NO. 47:**

23 All MATERIALS constituting, recording, referring to, or evidencing any failure or
 24 omission to submit any prior art reference or other information to the United States Patent and
 25 Trademark Office in connection with the '041 APPLICATION or '450 PATENT.

26 **RESPONSE TO REQUEST FOR PRODUCTION NO. 47:**

27 Netflix objects as the phrase "failure or omission to submit any prior art reference"
 28 is vague, ambiguous, and calls for a legal conclusion. Netflix further objects to this Request to

1 the extent that it calls for information protected by the attorney-client privilege or the work
 2 product doctrine.

3 **REQUEST FOR PRODUCTION NO. 48:**

4 All MATERIALS constituting, recording, referring to, or evidencing any failure or
 5 omission to submit any prior art reference or other information to the United States Patent and
 6 Trademark Office in connection with the '727 APPLICATION or '381 PATENT.

7 **RESPONSE TO REQUEST FOR PRODUCTION NO. 48:**

8 Netflix objects as the phrase "failure or omission to submit any prior art reference" is vague, ambiguous, and calls for a legal conclusion. Netflix further objects to this Request to
 9 the extent that it calls for information protected by the attorney-client privilege or the work
 10 product doctrine.

11 ///

12 **REQUEST FOR PRODUCTION NO. 49:**

13 All MATERIALS constituting, recording, referring to, or evidencing any failure or omission to submit any prior art reference or other information to the United States Patent and Trademark Office or any other patent office or agency in connection with any SUBJECT APPLICATION OR PATENT.

14 **RESPONSE TO REQUEST FOR PRODUCTION NO. 49:**

15 Netflix objects to Blockbuster's demand that it produce documents relating to its
 16 patents and/or applications other than the patents-in-suit, because such patents/applications have
 17 no relevance to any issue in this case. Netflix further objects to producing documents relating to
 18 its patent applications that have not either been issued or been published on the grounds that the
 19 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
 20 information regarding Netflix's future business plans, and should not be produced to a company
 21 that is seeking directly to compete with Netflix in the market, such as Blockbuster. Netflix
 22 further objects to Blockbuster's Request that it produce documents relating to prosecution of
 23 patents before patent offices or agencies other than the United States Patent and Trademark
 24 Office. The prosecution of patents that are not only not asserted in this case, but cannot be

1 asserted here because they are being prosecuted and will be issued in a foreign country, is in no
 2 way relevant to any of the issues presented in this case.

3 Netflix objects as the phrase “failure or omission to submit any prior art reference”
 4 is vague, ambiguous, and calls for a legal conclusion. Netflix further objects to this Request to
 5 the extent that it calls for information protected by the attorney-client privilege or the work
 6 product doctrine.

7 **REQUEST FOR PRODUCTION NO. 52:**

8 All MATERIALS constituting, recording, referring to, or evidencing any reason or
 9 justification for submitting or not submitting any prior art reference or other information to the
 10 United States Patent and Trademark Office or any other patent office or agency in connection
 11 with any SUBJECT APPLICATION OR PATENT.

12 ///

13 **RESPONSE TO REQUEST FOR PRODUCTION NO. 52:**

14 Netflix objects to Blockbuster’s demand that it produce documents relating to its
 15 patents and/or applications other than the patents-in-suit, because such patents/applications have
 16 no relevance to any issue in this case. Netflix further objects to producing documents relating to
 17 its patent applications that have not either been issued or been published on the grounds that the
 18 pendency of these patents, and the nature of the areas that they cover, is competitively sensitive
 19 information regarding Netflix’s future business plans, and should not be produced to a company
 20 that is seeking directly to compete with Netflix in the market, such as Blockbuster. Netflix
 21 further objects to Blockbuster’s Request that it produce documents relating to prosecution of
 22 patents before patent offices or agencies other than the United States Patent and Trademark
 23 Office. The prosecution of patents that are not only not asserted in this case, but cannot be
 24 asserted here because they are being prosecuted and will be issued in a foreign country, is in no
 25 way relevant to any of the issues presented in this case.

26 Netflix objects to this Request on the grounds that it is overly broad and unduly
 27 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
 28 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to

1 this Request to the extent that it calls for information protected by the attorney-client privilege or
 2 the work product doctrine. Netflix also objects to the extent that this Request duplicates prior
 3 Requests.

4 Subject to and without waiving the foregoing objections, Netflix will produce all
 5 nonprivileged, responsive documents so described and related to the '381 and '450 patents that
 6 are locatable after a diligent search of all locations at which such materials might plausibly exist.

7 **REQUEST FOR PRODUCTION NO. 53:**

8 All MATERIALS asserting, recording, referring to, or evidencing any failure or
 9 omission by NETFLIX to submit any prior art reference or other information to the United States
 10 Patent and Trademark Office or any other patent office or agency.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 53:**

12 Netflix objects to Blockbuster's Request that it produce documents relating to
 13 prosecution of patents before patent offices or agencies other than the United States Patent and
 14 Trademark Office. The prosecution of patents that are not only not asserted in this case, but
 15 cannot be asserted here because they are being prosecuted and will be issued in a foreign country,
 16 is in no way relevant to any of the issues presented in this case. Netflix further objects as the
 17 phrase "failure or omission . . . to submit any prior art reference" is vague, ambiguous, and calls
 18 for a legal conclusion.

19 Netflix objects to this Request on the grounds that it is overly broad and unduly
 20 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
 21 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to
 22 this Request to the extent that it calls for information protected by the attorney-client privilege or
 23 the work product doctrine. Netflix also objects to the extent that this Request duplicates prior
 24 Requests.

25 **REQUEST FOR PRODUCTION NO. 54:**

26 All MATERIALS asserting, recording, referring to, or evidencing any failure or
 27 omission by NETFLIX or any PERSON UNDER A DUTY OF CANDOR to submit any prior art
 28 reference or other information to the United States Patent and Trademark Office or any other

1 patent office or agency.

2 **RESPONSE TO REQUEST FOR PRODUCTION NO. 54:**

3 Netflix objects to Blockbuster's Request that it produce documents relating to
 4 prosecution of patents before patent offices or agencies other than the United States Patent and
 5 Trademark Office. The prosecution of patents that are not only not asserted in this case, but
 6 cannot be asserted here because they are being prosecuted and will be issued in a foreign country,
 7 is in no way relevant to any of the issues presented in this case. Netflix further objects as the
 8 phrase "failure or omission . . . to submit any prior art reference" is vague, ambiguous, and calls
 9 for a legal conclusion.

10 Netflix objects to this Request on the grounds that it is overly broad and unduly
 11 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
 12 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to
 13 the extent that this Request duplicates prior Requests.

14 **Documents Relating to Preferential Selection Methodologies Referred to as**
"Throttling" (Requests Nos. 24-26 and 128-29)

15 57. The text of each of these requests and of each of Netflix's written
 16 responses to them is as follows:

17 **REQUEST FOR PRODUCTION NO. 24:**

18 All MATERIALS filed, served, and produced for inspection by an adverse party in
 19 *Frank Chavez v. Netflix, Inc.*, San Francisco Superior Court Case No. CGC 04-434884, and any
 20 transcripts or other records of any discovery or proceedings in that case.

21 **RESPONSE TO REQUEST FOR PRODUCTION NO. 24:**

22 Netflix objects to this Request on the grounds that it seeks material that is
 23 irrelevant to the subject matter of this action and is not reasonably calculated to lead to the
 24 discovery of admissible evidence. Netflix further objects to this Request to the extent that it calls
 25 for information protected by the attorney-client privilege or the work product doctrine.

26 **REQUEST FOR PRODUCTION NO. 25:**

27 All MATERIALS constituting, recording, referring to, or evidencing

1 COMMUNICATIONS between the parties in *Frank Chavez v. Netflix, Inc.*, San Francisco
 2 Superior Court Case No. CGC 04-434884, or their respective counsel.

3 **RESPONSE TO REQUEST FOR PRODUCTION NO. 25:**

4 Netflix objects that this Request seeks material that is irrelevant to the subject
 5 matter of this action and is not reasonably calculated to lead to the discovery of admissible
 6 evidence. Netflix further objects to this Request to the extent that it calls for information
 7 protected by the attorney-client privilege or the work product doctrine.

8 **REQUEST FOR PRODUCTION NO. 26:**

9 All MATERIALS constituting, referring to, recording, or evidencing any
 10 settlement negotiations concerning *Frank Chavez v. Netflix, Inc.*, San Francisco Superior Court
 11 Case No. CGC 04-434884.

12 ///

13 **RESPONSE TO REQUEST FOR PRODUCTION NO. 26:**

14 Netflix objects that this Request seeks material that is irrelevant to the subject
 15 matter of this action and is not reasonably calculated to lead to the discovery of admissible
 16 evidence. Netflix further objects to this Request to the extent that it calls for information
 17 protected by the attorney-client privilege or the work product doctrine.

18 **REQUEST FOR PRODUCTION NO. 128:**

19 All MATERIALS asserting, evidencing, reflecting, o[r] referring to any use by
 20 NETFLIX of any practice known as “throttling” on or before April 28, 2000.

21 **RESPONSE TO REQUEST FOR PRODUCTION NO. 128:**

22 Netflix objects to this Request as seeking material that is irrelevant to the subject
 23 matter of this action and is not reasonably calculated to lead to the discovery of admissible
 24 evidence. Netflix further objects to this Request to the extent that it calls for information
 25 protected by the attorney-client privilege or the work product doctrine.

26 **REQUEST FOR PRODUCTION NO. 129:**

27 All MATERIALS asserting, evidencing, reflecting, or referring to any use by
 28 NETFLIX of any practice known as “throttling” on or before May 14, 2003.

RESPONSE TO REQUEST FOR PRODUCTION NO. 129:

Netflix objects to this Request as seeking material that is irrelevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to this Request to the extent that it calls for information protected by the attorney-client privilege or the work product doctrine.

Documents Related to Delivery by the Postal Service (Requests Nos. 130-32)

58. The text of each of these requests and of each of Netflix's written responses to them is as follows:

REQUEST FOR PRODUCTION NO. 130:

All MATERIALS asserting, evidencing, reflecting, or referring to any preferential sorting or handling of NETFLIX mail.

RESPONSE TO REQUEST FOR PRODUCTION NO. 130:

Netflix objects to this Request as seeking material that is irrelevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to this Request to the extent that it calls for information protected by the attorney-client privilege or the work product doctrine.

REQUEST FOR PRODUCTION NO. 131:

All MATERIALS evidencing, reflecting, or referring to any COMMUNICATIONS between NETFLIX and any employee of the United States Postal Service concerning any preferential sorting or handling of NETFLIX mail.

RESPONSE TO REQUEST FOR PRODUCTION NO. 131:

Netflix objects to this Request as seeking material that is irrelevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to this Request to the extent that it calls for information protected by the attorney-client privilege or the work product doctrine.

REQUEST FOR PRODUCTION NO. 132:

All MATERIALS evidencing, reflecting, or referring to any COMMUNICATIONS between William J. Henderson and the United States Postal Service

1 concerning NETFLIX.

2 **RESPONSE TO REQUEST FOR PRODUCTION NO. 132:**

3 Netflix objects to this Request as seeking material that is irrelevant to the subject
 4 matter of this action and is not reasonably calculated to lead to the discovery of admissible
 5 evidence. Netflix further objects to this Request to the extent that it calls for information
 6 protected by the attorney-client privilege or the work product doctrine.

7 **Documents Related to Prior Art Known to Netflix (Requests Nos. 32, 34-36, 55-57,
 8 67-71, 73-74, 78-81, 86, 88-90, 93-100, 105, 113-17, and 119)**

9 59. The text of each of these requests and of each of Netflix's written
 10 responses to them is as follows:

11 **REQUEST FOR PRODUCTION NO. 32:**

12 All MATERIALS referring to or evidencing HBO, Showtime, or any subscription
 13 cable or satellite television service or pay television service in existence before April 28, 1999, or
 14 referring to or evidencing any knowledge thereof by NETFLIX or any PERSON UNDER A
 15 DUTY OF CANDOR at any time before April 4, 2006.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 32:**

17 Netflix objects to this Request on the grounds that it is overly broad and unduly
 18 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
 19 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to
 20 this Request to the extent that it calls for information protected by the attorney-client privilege or
 21 the work product doctrine. Netflix also objects to this Request as vague and ambiguous with
 22 regard to "any subscription cable or satellite television service or pay television service." Netflix
 23 further objects to producing minutiae of a personal nature that are literally responsive to this
 24 Request, such as any personal purchases orders of its employees from any subscription cable or
 25 satellite television service or pay television service in existence before April 28, 1999.

26 Subject to and without waiving the foregoing objections, Netflix will produce all
 27 nonprivileged, responsive documents that so reference "HBO" or "Showtime" and that are
 28 locatable after a diligent search of all locations at which such materials might plausibly exist.

1 Further, Netflix is willing to meet and confer with Blockbuster in order to arrive at a narrowed
 2 Request that could possibly yield additional materials relevant to this case without imposing the
 3 burdens associated with this Request in its current form, but Netflix will not undertake to discern
 4 a reasonable interpretation of, and engage in a corresponding search for responsive documents
 5 that make any reference to, "any subscription cable or satellite television service or pay television
 6 service in existence before April 28, 1999."

7 **REQUEST FOR PRODUCTION NO. 34:**

8 All MATERIALS referring to or evidencing Webvan, Home Grocer.com, or any
 9 Internet grocery service in existence before April 28, 1999, or referring to or evidencing any
 10 knowledge thereof by NETFLIX or any PERSON UNDER A DUTY OF CANDOR of at any
 11 time before April 4, 2006.

12 **RESPONSE TO REQUEST FOR PRODUCTION NO. 34:**

13 Netflix objects to this Request on the grounds that it is overly broad and unduly
 14 burdensome, seeking material that is irrelevant to the subject matter of this action and is not
 15 reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to
 16 this Request to the extent that it calls for information protected by the attorney-client privilege or
 17 the work product doctrine. Netflix also objects to this Request as vague and ambiguous with
 18 regard to "any Internet grocery service." Netflix further objects to producing minutiae of a
 19 personal nature that are literally responsive to this Request, such as any personal purchases orders
 20 of its employees from any Internet grocery service in existence before April 28, 1999.

21 Subject to and without waiving the foregoing objections, Netflix will produce all
 22 nonprivileged, responsive documents that so reference "Webvan" or "Home Grocer" and that are
 23 locatable after a diligent search of all locations at which such materials might plausibly exist.
 24 Further, Netflix is willing to meet and confer with Blockbuster in order to arrive at a narrowed
 25 Request that could possibly yield additional materials relevant to this case without imposing the
 26 burdens associated with this Request in its current form, but Netflix will not undertake to discern
 27 a reasonable interpretation of, and engage in a corresponding search for responsive documents
 28 that make any reference to, "any Internet grocery service in existence before April 28, 1999."

REQUEST FOR PRODUCTION NO. 35:

All MATERIALS referring to or evidencing Amazon.com or referring to or evidencing any knowledge of Amazon.com by NETFLIX or any PERSON UNDER A DUTY OF CANDOR at any time before April 4, 2006.

RESPONSE TO REQUEST FOR PRODUCTION NO. 35:

Netflix objects to this Request on the grounds that it is overly broad and unduly burdensome, seeking material that is irrelevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to this Request to the extent that it calls for information protected by the attorney-client privilege or the work product doctrine. Netflix further objects to producing minutiae of a personal nature that are literally responsive to this Request, such as any personal purchases orders of its employees from Amazon.com.

Subject to and without waiving the foregoing objections, Netflix will produce all nonprivileged, responsive documents so described that are locatable after a diligent search of all locations at which such materials might plausibly exist.

REQUEST FOR PRODUCTION NO. 36:

All MATERIALS referring to or evidencing eBay or referring to or evidencing any knowledge of eBay by NETFLIX or any PERSON UNDER A DUTY OF CANDOR at any time before April 4, 2006.

RESPONSE TO REQUEST FOR PRODUCTION NO. 36:

Netflix objects to this Request on the grounds that it is overly broad and unduly burdensome, seeking material that is irrelevant to the subject matter of this action and is not reasonably calculated to lead to the discovery of admissible evidence. Netflix further objects to this Request to the extent that it calls for information protected by the attorney-client privilege or the work product doctrine. Netflix further objects to producing minutiae of a personal nature that are literally responsive to this Request, such as any personal purchases orders of its employees from eBay.

Subject to and without waiving the foregoing objections, Netflix will produce all

1 non-privileged, responsive documents so described that are locatable after a diligent search of all
 2 locations at which such materials might plausibly exist.

3 **REQUEST FOR PRODUCTION NO. 55:**

4 All MATERIALS constituting, recording, referring to, or evidencing any use,
 5 description nor disclosure, prior to April 28, 1999, of any computer-implemented rental of movies
 6 to a customer.

7 **RESPONSE TO REQUEST FOR PRODUCTION NO. 55:**

8 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 9 this Request could be read to purport to require Netflix to conduct a search for and produce
 10 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 11 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 12 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 13 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 14 construction well prior to the date provided for in the Court's Case Management Order and the
 15 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 16 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 17 documents literally called for by the Request, without any further context, Netflix objects to the
 18 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 19 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 20 by requiring it to mount a search for and produce documents that could fall within the literal
 21 terms of snippets of the claims of its patents.

22 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 23 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 24 the burdens associated with a search for documents responsive to the Request in its current form,
 25 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 26 corresponding search for documents responsive to, the Request as currently phrased.

27 **REQUEST FOR PRODUCTION NO. 56:**

28 MATERIALS sufficient to fully describe any use, practice, description, or

1 disclosure, prior to April 28, 1999, of any computer-implemented rental of movies to customers.

2 **RESPONSE TO REQUEST FOR PRODUCTION NO. 56:**

3 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 4 this Request could be read to purport to require Netflix to conduct a search for and produce
 5 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 6 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 7 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 8 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 9 construction well prior to the date provided for in the Court's Case Management Order and the
 10 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 11 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 12 documents literally called for by the Request, without any further context, Netflix objects to the
 13 request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 14 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 15 by requiring it to mount a search for and produce documents that could fall within the literal
 16 terms of snippets of the claims of its patents.

17 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 18 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 19 the burdens associated with a search for documents responsive to the Request in its current form,
 20 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 21 corresponding search for documents responsive to, the Request as currently phrased.

22 **REQUEST FOR PRODUCTION NO. 57:**

23 MATERIALS sufficient to fully describe any use, practice, description, or
 24 disclosure, prior to April 28, 1999, of providing electronic digital information that caused one of
 25 more attributes of movies to be displayed.

26 **RESPONSE TO REQUEST FOR PRODUCTION NO. 57:**

27 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 28 this Request could be read to purport to require Netflix to conduct a search for and produce

1 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 2 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 3 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 4 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 5 construction well prior to the date provided for in the Court's Case Management Order and the
 6 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 7 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 8 documents literally called for by the Request, without any further context, Netflix objects to the
 9 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 10 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 11 by requiring it to mount a search for and produce documents that could fall within the literal
 12 terms of snippets of the claims of its patents.

13 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 14 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 15 the burdens associated with a search for documents responsive to the Request in its current form,
 16 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 17 corresponding search for documents responsive to, the Request as currently phrased.

18 **REQUEST FOR PRODUCTION NO. 67:**

19 MATERIALS sufficient to fully describe any use, practice, description, or
 20 disclosure, prior to April 28, 1999, of a rental agreement that provided for a periodic fee.

21 **RESPONSE TO REQUEST FOR PRODUCTION NO. 67:**

22 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 23 this Request could be read to purport to require Netflix to conduct a search for and produce
 24 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 25 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 26 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 27 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 28 construction well prior to the date provided for in the Court's Case Management Order and the

1 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 2 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 3 documents literally called for by the Request, without any further context, Netflix objects to the
 4 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 5 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 6 by requiring it to mount a search for and produce documents that could fall within the literal
 7 terms of snippets of the claims of its patents.

8 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 9 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 10 the burdens associated with a search for documents responsive to the Request in its current form,
 11 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 12 corresponding search for documents responsive to, the Request as currently phrased.

13 **REQUEST FOR PRODUCTION NO. 68:**

14 MATERIALS sufficient to fully describe any use, practice, description, or
 15 disclosure, prior to April 28, 1999, of establishing a rental agreement over the Internet.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 68:**

17 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 18 this Request could be read to purport to require Netflix to conduct a search for and produce
 19 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 20 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 21 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 22 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 23 construction well prior to the date provided for in the Court's Case Management Order and the
 24 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 25 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 26 documents literally called for by the Request, without any further context, Netflix objects to the
 27 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 28 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix

1 by requiring it to mount a search for and produce documents that could fall within the literal
 2 terms of snippets of the claims of its patents.

3 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 4 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 5 the burdens associated with a search for documents responsive to the Request in its current form,
 6 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 7 corresponding search for documents responsive to, the Request as currently phrased.

8 **REQUEST FOR PRODUCTION NO. 69:**

9 All MATERIALS constituting, recording, referring to, or evidencing any use
 10 practice, description, or disclosure, prior to April 28, 1999, of shipping a movie only if a fee was
 11 current.

12 ///

13 **RESPONSE TO REQUEST FOR PRODUCTION NO. 69:**

14 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 15 this Request could be read to purport to require Netflix to conduct a search for and produce
 16 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 17 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 18 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 19 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 20 construction well prior to the date provided for in the Court's Case Management Order and the
 21 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 22 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 23 documents literally called for by the Request, without any further context, Netflix objects to the
 24 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 25 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 26 by requiring it to mount a search for and produce documents that could fall within the literal
 27 terms of snippets of the claims of its patents.

28 Although Netflix is willing to meet and confer with Blockbuster in order to arrive

1 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 2 the burdens associated with a search for documents responsive to the Request in its current form,
 3 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 4 corresponding search for documents responsive to, the Request as currently phrased.

5 **REQUEST FOR PRODUCTION NO. 70:**

6 MATERIALS sufficient to fully describe any use, practice, description, or
 7 disclosure, prior to April 28, 1999, of any computer system for renting movies.

8 **RESPONSE TO REQUEST FOR PRODUCTION NO. 70:**

9 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 10 this Request could be read to purport to require Netflix to conduct a search for and produce
 11 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 12 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 13 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 14 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 15 construction well prior to the date provided for in the Court's Case Management Order and the
 16 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 17 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 18 documents literally called for by the Request, without any further context, Netflix objects to the
 19 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 20 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 21 by requiring it to mount a search for and produce documents that could fall within the literal
 22 terms of snippets of the claims of its patents.

23 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 24 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 25 the burdens associated with a search for documents responsive to the Request in its current form,
 26 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 27 corresponding search for documents responsive to, the Request as currently phrased.

28

1 **REQUEST FOR PRODUCTION NO. 71:**

2 MATERIALS sufficient to fully describe any use, practice, description, or
 3 disclosure, prior to April 28, 1999, of renting movies using a computer coupled to a digital
 4 telecommunications network.

5 **RESPONSE TO REQUEST FOR PRODUCTION NO. 71:**

6 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 7 this Request could be read to purport to require Netflix to conduct a search for and produce
 8 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 9 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 10 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 11 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 12 construction well prior to the date provided for in the Court's Case Management Order and the
 13 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 14 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 15 documents literally called for by the Request, without any further context, Netflix objects to the
 16 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 17 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 18 by requiring it to mount a search for and produce documents that could fall within the literal
 19 terms of snippets of the claims of its patents.

20 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 21 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 22 the burdens associated with a search for documents responsive to the Request in its current form,
 23 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 24 corresponding search for documents responsive to, the Request as currently phrased.

25 **REQUEST FOR PRODUCTION NO. 72:**

26 MATERIALS sufficient to fully describe any use, practice, description, or
 27 disclosure, prior to April 28, 1999, of renting movies using a computer coupled to a digital
 28 telecommunications network.

RESPONSE TO REQUEST FOR PRODUCTION NO. 72:

Refer to Netflix's response to Request for Production No. 71.

REQUEST FOR PRODUCTION NO. 73:

MATERIALS sufficient to fully describe any use, practice, description, or disclosure, prior to April 28, 1999, of renting movies using a computer with electronic digital memory.

RESPONSE TO REQUEST FOR PRODUCTION NO. 73:

Refer to Netflix's response to Request for Production No. 70

REQUEST FOR PRODUCTION NO. 74:

MATERIALS sufficient to fully describe any use, practice, description, or disclosure, prior to April 28, 1999, of renting movies using a computer with programs stored in memory causing the computer to perform steps.

111

RESPONSE TO REQUEST FOR PRODUCTION NO. 74:

Refer to Netflix's response to Request for Production No. 70.

REQUEST FOR PRODUCTION NO. 78:

MATERIALS sufficient to fully describe any use, practice, description, or disclosure, prior to April 28, 1999, of any computer-implemented method in which two or more movies for renting to a customer are selected by a customer.

RESPONSE TO REQUEST FOR PRODUCTION NO. 78:

Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand, this Request could be read to purport to require Netflix to conduct a search for and produce materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may or may not eventually be in dispute in order to respond to this Request, Netflix objects to the Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim construction well prior to the date provided for in the Court's Case Management Order and the Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.

1 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 2 documents literally called for by the Request, without any further context, Netflix objects to the
 3 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 4 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 5 by requiring it to mount a search for and produce documents that could fall within the literal
 6 terms of snippets of the claims of its patents.

7 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 8 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 9 the burdens associated with a search for documents responsive to the Request in its current form,
 10 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 11 corresponding search for documents responsive to, the Request as currently phrased.

12 **REQUEST FOR PRODUCTION NO. 79:**

13 All MATERIALS constituting, recording, referring to, or evidencing any use,
 14 practice, description, or disclosure, prior to April 28, 1999, of determining the order of two or
 15 more movies based upon one or more preferences of a customer.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 79:**

17 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 18 this Request could be read to purport to require Netflix to conduct a search for and produce
 19 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 20 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 21 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 22 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 23 construction well prior to the date provided for in the Court's Case Management Order and the
 24 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 25 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 26 documents literally called for by the Request, without any further context, Netflix objects to the
 27 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 28 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix

1 by requiring it to mount a search for and produce documents that could fall within the literal
 2 terms of snippets of the claims of its patents.

3 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 4 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 5 the burdens associated with a search for documents responsive to the Request in its current form,
 6 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 7 corresponding search for documents responsive to, the Request as currently phrased.

8 **REQUEST FOR PRODUCTION NO. 80:**

9 MATERIALS sufficient to fully describe any use, practice, description, or
 10 disclosure, prior to April 28, 1999, of any delivery of a selected movie by mail.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 80:**

12 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 13 this Request could be read to purport to require Netflix to conduct a search for and produce
 14 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 15 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 16 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 17 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 18 construction well prior to the date provided for in the Court's Case Management Order and the
 19 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 20 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 21 documents literally called for by the Request, without any further context, Netflix objects to the
 22 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 23 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 24 by requiring it to mount a search for and produce documents that could fall within the literal
 25 terms of snippets of the claims of its patents.

26 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 27 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 28 the burdens associated with a search for documents responsive to the Request in its current form,

1 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 2 corresponding search for documents responsive to, the Request as currently phrased.

3 **REQUEST FOR PRODUCTION NO. 81:**

4 MATERIALS sufficient to fully describe any use, practice, description, or
 5 disclosure, prior to April 28, 1999, of any delivery of a selected movie by mail on one or more
 6 optical media.

7 **RESPONSE TO REQUEST FOR PRODUCTION NO. 81:**

8 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 9 this Request could be read to purport to require Netflix to conduct a search for and produce
 10 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 11 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 12 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 13 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 14 construction well prior to the date provided for in the Court's Case Management Order and the
 15 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 16 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 17 documents literally called for by the Request, without any further context, Netflix objects to the
 18 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 19 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 20 by requiring it to mount a search for and produce documents that could fall within the literal
 21 terms of snippets of the claims of its patents.

22 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 23 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 24 the burdens associated with a search for documents responsive to the Request in its current form,
 25 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 26 corresponding search for documents responsive to, the Request as currently phrased.

27 **REQUEST FOR PRODUCTION NO. 86:**

28 MATERIALS sufficient to fully describe any use, practice, description, or

1 disclosure, prior to April 28, 1999, of rental of any of motion pictures, television series,
 2 documentaries, cartoons, music videos, video recordings of concert performances, instructional
 3 programs, or educational programs.

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 86:**

5 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 6 this Request could be read to purport to require Netflix to conduct a search for and produce
 7 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 8 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 9 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 10 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 11 construction well prior to the date provided for in the Court's Case Management Order and the
 12 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 13 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 14 documents literally called for by the Request, without any further context, Netflix objects to the
 15 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 16 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 17 by requiring it to mount a search for and produce documents that could fall within the literal
 18 terms of snippets of the claims of its patents.

19 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 20 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 21 the burdens associated with a search for documents responsive to the Request in its current form,
 22 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 23 corresponding search for documents responsive to, the Request as currently phrased.

24 **REQUEST FOR PRODUCTION NO. 88:**

25 MATERIALS sufficient to fully describe any use, practice, description, or
 26 disclosure, prior to April 28, 1999, of providing a customer up to a specified number of items
 27 indicated by one or more selection criteria.

28 **RESPONSE TO REQUEST FOR PRODUCTION NO. 88:**

1 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 2 this Request could be read to purport to require Netflix to conduct a search for and produce
 3 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 4 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 5 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 6 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 7 construction well prior to the date provided for in the Court's Case Management Order and the
 8 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 9 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 10 documents literally called for by the Request, without any further context, Netflix objects to the
 11 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 12 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 13 by requiring it to mount a search for and produce documents that could fall within the literal
 14 terms of snippets of the claims of its patents.

15 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 16 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 17 the burdens associated with a search for documents responsive to the Request in its current form,
 18 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 19 corresponding search for documents responsive to, the Request as currently phrased.

20 **REQUEST FOR PRODUCTION NO. 89:**

21 MATERIALS sufficient to fully describe any use, practice, description, or
 22 disclosure, prior to April 28, 1999, of, in response to receiving one or more items provided to a
 23 customer, providing the customer one or more other items indicated by one or more item
 24 selection criteria.

25 **RESPONSE TO REQUEST FOR PRODUCTION NO. 89:**

26 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 27 this Request could be read to purport to require Netflix to conduct a search for and produce
 28 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To

1 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 2 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 3 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 4 construction well prior to the date provided for in the Court's Case Management Order and the
 5 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 6 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 7 documents literally called for by the Request, without any further context, Netflix objects to the
 8 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 9 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 10 by requiring it to mount a search for and produce documents that could fall within the literal
 11 terms of snippets of the claims of its patents.

12 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 13 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 14 the burdens associated with a search for documents responsive to the Request in its current form,
 15 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 16 corresponding search for documents responsive to, the Request as currently phrased.

17 **REQUEST FOR PRODUCTION NO. 90:**

18 All MATERIALS constituting, recording, referring to, or evidencing any use,
 19 practice, description, or disclosure, prior to April 28, 1999, of any rental of items to a customer in
 20 which he total current number of items provided to the customer did not exceed a specified
 21 number.

22 **RESPONSE TO REQUEST FOR PRODUCTION NO. 90:**

23 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 24 this request could be read to purport to require Netflix to conduct a search for and produce
 25 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 26 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 27 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 28 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim

1 construction well prior to the date provided for in the Court's Case Management Order and the
 2 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 3 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 4 Documents literally called for by the Request, without any further context, Netflix objects to the
 5 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 6 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 7 by requiring it to mount a search for and produce documents that could fall within the literal
 8 terms of snippets of the claims of its patents.

9 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 10 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 11 the burdens associated with a search for documents responsive to the Request in its current form,
 12 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 13 corresponding search for documents responsive to, the Request as currently phrased.

14 **REQUEST FOR PRODUCTION NO. 93:**

15 MATERIALS sufficient to fully describe any use, practice, description, or
 16 disclosure, prior to April 28, 1999, of a computer-readable medium for renting items to
 17 customers.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 93:**

19 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 20 this Request could be read to purport to require Netflix to conduct a search for and produce
 21 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 22 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element, this
 23 Request is irrelevant, as Netflix has not asserted a claim containing the above language.

24 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 25 documents literally called for by the Request, without any further context, Netflix objects to the
 26 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 27 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 28 by requiring it to mount a search for and produce documents that could fall within the literal

1 terms of snippets of the claims of its patents.

2 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 3 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 4 the burdens associated with a search for documents responsive to the Request in its current form,
 5 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 6 corresponding search for documents responsive to, the Request as currently phrased.

7 **REQUEST FOR PRODUCTION NO. 94:**

8 MATERIALS sufficient to fully describe any use, practice, description, or
 9 disclosure, prior to April 28, 1999, of a computer-readable medium for renting items to customers
 10 that carried one or more sequences of instructions.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 94:**

12 Refer to Netflix's response to Request for Production No. 93.

13 ///

14 **REQUEST FOR PRODUCTION NO. 95:**

15 MATERIALS sufficient to fully describe any use, practice, description, or
 16 disclosure, prior to April 28, 1999, of instructions that, when executed by one or more processors,
 17 caused one or more of them to perform steps for renting items to customers.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 95:**

19 Refer to Netflix's response to Request for Production No. 93.

20 **REQUEST FOR PRODUCTION NO. 96:**

21 MATERIALS sufficient to fully describe any use, practice, description, or
 22 disclosure, prior to April 28, 1999, of an apparatus for renting items to customers, the apparatus
 23 including one or more processors.

24 **RESPONSE TO REQUEST FOR PRODUCTION NO. 96:**

25 Refer to Netflix's response to Request for Production No. 93.

26 **REQUEST FOR PRODUCTION NO. 97:**

27 MATERIALS sufficient to fully describe any use, practice, description, or
 28 disclosure, prior to April 28, 1999, of an apparatus for renting items to customers, the apparatus

1 including a memory communicatively coupled to the one or more processors, the memory
 2 including one or more sequences of one or more instructions which, when executed by the one or
 3 more processors, caused the one or more processors to perform steps.

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 97:**

5 Refer to Netflix's response to Request for Production No. 93.

6 **REQUEST FOR PRODUCTION NO. 98:**

7 MATERIALS sufficient to fully describe any use, practice, description, or
 8 disclosure, prior to April 28, 1999, of an apparatus for renting items to customers comprising an
 9 item rental mechanism configured to perform steps.

10 **RESPONSE TO REQUEST FOR PRODUCTION NO. 98:**

11 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 12 this Request could be read to purport to require Netflix to conduct a search for and produce
 13 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 14 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element, this
 15 Request is irrelevant, as Netflix has not asserted a claim containing the above language.
 16 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 17 documents literally called for by the Request, without any further context, Netflix objects to the
 18 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 19 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 20 by requiring it to mount a search for and produce documents that could fall within the literal
 21 terms of snippets of the claims of its patents.

22 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 23 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 24 the burdens associated with a search for documents responsive to the Request in its current form,
 25 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 26 corresponding search for documents responsive to, the Request as currently phrased.

27 **REQUEST FOR PRODUCTION NO. 99:**

28 All MATERIALS constituting, recording, referring to, or evidencing any use,

1 practice, description, or disclosure, prior to April 28, 1999, of any rental of items to customers in
 2 which a total number of items provided to the customer within a specified period of time did not
 3 exceed a specified limit.

4 **RESPONSE TO REQUEST FOR PRODUCTION NO. 99:**

5 Refer to Netflix's response to Request for Production No. 90.

6 **REQUEST FOR PRODUCTION NO. 100:**

7 All MATERIALS constituting, recording, referring to, or evidencing any use,
 8 practice, description, or disclosure, prior to April 28, 1999, of any rental of items to customers in
 9 which a total number of items provided to the customer within a specified period of time did not
 10 exceed a specified number.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 100:**

12 Refer to Netflix's response to Request for Production No. 99.

13 ///

14 **REQUEST FOR PRODUCTION NO. 105:**

15 All MATERIALS constituting, recording, referring to, or evidencing any use,
 16 practice, description, or disclosure, prior to April 28, 1999, of item selection criteria specifying
 17 one or more preferred item attributes.

18 **RESPONSE TO REQUEST FOR PRODUCTION NO. 105:**

19 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 20 this Request could be read to purport to require Netflix to conduct a search for and produce
 21 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 22 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 23 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 24 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 25 construction well prior to the date provided for in the Court's Case Management Order and the
 26 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 27 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 28 documents literally called for by the Request, without any further context, Netflix objects to the

1 request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 2 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 3 by requiring it to mount a search for and produce documents that could fall within the literal
 4 terms of snippets of the claims of its patents.

5 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 6 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 7 the burdens associated with a search for documents responsive to the Request in its current form,
 8 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 9 corresponding search for documents responsive to, the Request as currently phrased.

10 **REQUEST FOR PRODUCTION NO. 113:**

11 All MATERIALS constituting, recording, referring to, or evidencing any use,
 12 practice, description, or disclosure, prior to April 28, 1999, of, in response to receiving a customer
 13 notification, providing the customer a second set of one or more items indicated by item selection
 14 criteria.

15 **RESPONSE TO REQUEST FOR PRODUCTION NO. 113:**

16 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 17 this Request could be read to purport to require Netflix to conduct a search for and produce
 18 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 19 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 20 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 21 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 22 construction well prior to the date provided for in the Court's Case Management Order and the
 23 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 24 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 25 documents literally called for by the Request, without any further context, Netflix objects to the
 26 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 27 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 28 by requiring it to mount a search for and produce documents that could fall within the literal

1 terms of snippets of the claims of its patents.

2 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 3 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 4 the burdens associated with a search for documents responsive to the Request in its current form,
 5 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 6 corresponding search for documents responsive to, the Request as currently phrased.

7 **REQUEST FOR PRODUCTION NO. 114:**

8 All MATERIALS constituting, recording, referring to, or evidencing any use,
 9 practice, description, or disclosure, prior to April 28, 1999, of, in response to expiration of a
 10 specified amount of time, providing a customer a second set of one or more items indicated by
 11 item selection criteria.

12 **RESPONSE TO REQUEST FOR PRODUCTION NO. 114:**

13 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 14 this Request could be read to purport to require Netflix to conduct a search for and produce
 15 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 16 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 17 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 18 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 19 construction well prior to the date provided for in the Court's Case Management Order and the
 20 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 21 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 22 documents literally called for by the Request, without any further context, Netflix objects to the
 23 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 24 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 25 by requiring it to mount a search for and produce documents that could fall within the literal
 26 terms of snippets of the claims of its patents.

27 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 28 at a narrowed Request that could possibly yield materials relevant to this case without imposing

1 the burdens associated with a search for documents responsive to the Request in its current form,
 2 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 3 corresponding search for documents responsive to, the Request as currently phrased.

4 **REQUEST FOR PRODUCTION NO. 115:**

5 All MATERIALS constituting, recording, referring to, or evidencing any use,
 6 practice, description, or disclosure, prior to April 28, 1999, of, in response to a specified date
 7 being reached, providing a customer a second set of one or more items indicated by item selection
 8 criteria.

9 **RESPONSE TO REQUEST FOR PRODUCTION NO. 115:**

10 Refer to Netflix's response to Request for Production No. 114.

11 **REQUEST FOR PRODUCTION NO. 116:**

12 All MATERIALS constituting, recording, referring to, or evidencing any use,
 13 practice, description, or disclosure, prior to April 28, 1999, of, in response to a specified fee being
 14 received, providing a customer a second set of one or more items indicated by item selection
 15 criteria.

16 **RESPONSE TO REQUEST FOR PRODUCTION NO. 116:**

17 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 18 this Request could be read to purport to require Netflix to conduct a search for and produce
 19 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 20 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 21 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 22 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 23 construction well prior to the date provided for in the Court's Case Management Order and the
 24 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 25 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 26 Documents literally called for by the Request, without any further context, Netflix objects to the
 27 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 28 Discovery of admissible evidence. This Request is nothing more than an attempt to harass

1 Netflix by requiring it to mount a search for and produce documents that could fall within the
 2 literal terms of snippets of the claims of its patents.

3 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 4 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 5 the burdens associated with a search for documents responsive to the Request in its current form,
 6 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
 7 corresponding search for documents responsive to, the Request as currently phrased.

8 **REQUEST FOR PRODUCTION NO. 117:**

9 MATERIALS sufficient to fully describe any use, practice, description, or
 10 disclosure, prior to April 28, 1999, of providing rental items to a customer by mail.

11 **RESPONSE TO REQUEST FOR PRODUCTION NO. 117:**

12 Netflix objects to this Request as vague, ambiguous, and oppressive. On one hand,
 13 this Request could be read to purport to require Netflix to conduct a search for and produce
 14 materials that in any way relate to or depend on portions of the claims of the patents-in-suit. To
 15 the extent that Blockbuster seeks thereby to require Netflix to construe a claim element that may
 16 or may not eventually be in dispute in order to respond to this Request, Netflix objects to the
 17 Request as premature in that it seeks to impose upon Netflix a duty to come forward with a claim
 18 construction well prior to the date provided for in the Court's Case Management Order and the
 19 Local Rules of this Court, and objects to the Request as well as calling for a legal conclusion.
 20 Alternatively, to the extent that Blockbuster seeks to have Netflix search for and produce all
 21 documents literally called for by the Request, without any further context, Netflix objects to the
 22 Request as overly broad, unduly burdensome, and not reasonably calculated to lead to the
 23 discovery of admissible evidence. This Request is nothing more than an attempt to harass Netflix
 24 by requiring it to mount a search for and produce documents that could fall within the literal
 25 terms of snippets of the claims of its patents.

26 Although Netflix is willing to meet and confer with Blockbuster in order to arrive
 27 at a narrowed Request that could possibly yield materials relevant to this case without imposing
 28 the burdens associated with a search for documents responsive to the Request in its current form,

1 Netflix is not willing to undertake to discern a reasonable interpretation of, and engage in a
2 corresponding search for documents responsive to, the Request as currently phrased.

3 **REQUEST FOR PRODUCTION NO. 119:**

4 MATERIALS sufficient to fully describe any use, practice, description, or
5 disclosure, prior to April 28, 1999, of renting movies.

6 **RESPONSE TO REQUEST FOR PRODUCTION NO. 119:**

7 Refer to Netflix's response to Request for Production No. 86.

8 I declare under penalty of perjury under the laws of the United States that the
9 foregoing is true and correct.

10 Executed on November 3, 2005 at Santa Monica, California.

11 _____/S/ _____
12 William J. O'Brien

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